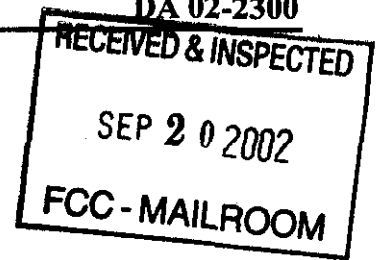


Before the  
Federal Communications Commission  
Washington, D.C. 20554



In the Matter of )

Petition of Global NAPs South, Inc. )  
Pursuant to Section 252(e)(5) of the )  
Communications Act for Expedited )  
Preemption of the Jurisdiction of the )  
Virginia State Corporation Commission )  
Regarding Interconnection Disputes with )  
Verizon-Virginia, Inc. )

WC Docket No. 02-180

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 17, 2002**

**Released: September 17, 2002**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. This *Memorandum Opinion and Order* addresses the petition of Global NAPs South, Inc. (Global NAPs) for preemption of the jurisdiction of the Virginia State Corporation Commission (Virginia Commission) with respect to the arbitration of an interconnection agreement with Verizon-Virginia, Inc. (Verizon).<sup>1</sup> Specifically, Global NAPs seeks preemption of the jurisdiction of the Virginia Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act).<sup>2</sup> For the reasons set forth below, we grant Global NAPs's petition in part, and deny it in part.

2. Section 252 of the Act sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier.<sup>3</sup> Section 252(b) permits a party negotiating an

<sup>1</sup> *Petition of Global NAPs South, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc.*, WC Docket No. 02-180 (filed June 19, 2002) (Global NAPs Preemption Petition); see *Pleading Cycle Established for Comments on Global NAPs Petition for Preemption Pursuant to Section 252(e)(5)*, WC Docket No. 02-180, Public Notice, DA 02-1567 (rel. July 2, 2002). On July 23, 2002, Verizon filed an opposition (Verizon Opposition).

<sup>2</sup> 47 U.S.C. § 252(e)(5). Section 252 was added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.*

<sup>3</sup> See generally 47 U.S.C. § 252.

interconnection agreement to petition the relevant state commission to arbitrate any open issues.<sup>4</sup> Section 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission “fails to act to carry out its responsibility” under section 252.<sup>5</sup>

3. On January 3, 2002, Global NAPs filed a petition with the Virginia Commission seeking arbitration under the Act of unresolved issues in Global NAPs’s interconnection agreement negotiations with Verizon.<sup>6</sup> On February 20, 2002, the Virginia Commission issued a Preliminary Order, declining to arbitrate the issues under the Act but permitting Global NAPs and Verizon fifteen days to elect to arbitrate the issues under Virginia state law.<sup>7</sup> Specifically, the Virginia Commission stated that, as it had in prior cases,

[U]ntil the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act’s federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth’s immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers.<sup>8</sup>

4. The parties declined to pursue arbitration under state law, and the Virginia Commission issued an Order of Dismissal on March 20, 2002, dismissing Global NAPs’s petition, and stating that it “will not arbitrate the interconnection issues under federal law” for the reasons it had stated in the Preliminary Order.<sup>9</sup>

5. Global NAPs filed the present Preemption Petition on June 19, 2002, requesting that this Commission preempt the jurisdiction of the Virginia Commission over the arbitration of unresolved issues in Global NAPs’s interconnection agreement negotiations with Verizon, and

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<sup>4</sup> 47 U.S.C. § 252(b).

<sup>5</sup> 47 U.S.C. § 252(e)(5). See, e.g., *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277 (2000) (*Starpower Preemption Order*).

<sup>6</sup> *Petition of Global NAPs Virginia Telcom, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Virginia, Inc.*, Case No. PUC020001 (filed Jan. 3, 2002) (*Virginia Petition*).

<sup>7</sup> *Petition of Global NAPs Virginia Telcom, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Virginia, Inc.*, Case No. PUC020001, Preliminary Order at 4-5 (Feb. 20, 2002) (*Global NAPs Preliminary Order*).

<sup>8</sup> *Id.* at 3-4.

<sup>9</sup> *Petition of Global NAPs Virginia Telcom, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Virginia, Inc.*, Case No. PUC020001, Order of Dismissal at 2 (March 20, 2002) (*Global NAPs Dismissal Order*).

urging the Commission to adopt specific procedures to govern arbitration of its issues with Verizon.<sup>10</sup>

## II. DISCUSSION

6. This petition involves virtually identical issues as those addressed by the Commission in *WorldCom Preemption Order*.<sup>11</sup> Accordingly, we grant Global NAPs's petition on the question of preemption and, pursuant to section 252(e)(5), assume the jurisdiction of the Virginia Commission over the interconnection arbitration proceeding between Global NAPs and Verizon in Virginia. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission "fails to act to carry out its responsibility under [section 252]."<sup>12</sup> Here, as in the *WorldCom* proceeding and several others,<sup>13</sup> the Virginia Commission expressly refused to apply federal law, citing the uncertainty surrounding the availability of Eleventh Amendment immunity from federal appeal under the Act.<sup>14</sup> In the *WorldCom Preemption Order*, the Commission concluded that, by insisting upon

<sup>10</sup> Among other things, Global NAPs requests a three-member arbitration panel, with a representative from each of three Commission Bureaus, as well as an accelerated arbitration schedule, to be conducted within 110 days. Global NAPs Preemption Petition at 8, 9-10.

<sup>11</sup> See *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224 (2001) (*WorldCom Preemption Order*).

<sup>12</sup> 47 U.S.C. § 252(e)(5). See also 47 C.F.R. § 51.801(b). The Commission has previously indicated that it will evaluate whether a state commission has fulfilled its responsibility under section 252 based on the particulars of each case. See, e.g., *Starpower Preemption Order*, 15 FCC Rcd at 11280, para. 8; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1758-59, paras. 5, 33 (1997), *recons. denied*, 14 FCC Rcd 7024 (1999).

<sup>13</sup> See *Global NAPs Preliminary Order* at 3-5; *Global NAPs Dismissal Order* at 1-2; *Petition of MCI Metro Access Transmission Services of Virginia, Inc., et al., for Arbitration*, Case No. PUC000225, Order, at 1-2 (Sept. 13, 2000). See also *Petition for Declaratory Judgment and Application for Arbitration of AT&T Communications of Virginia, Inc., et al.*, Case Nos. PUC000261 and PUC000282, Order, at 2-3 (Nov. 22, 2000); *Petition of Cox Virginia Telecom, Inc.*, Case No. PUC00212, Order of Dismissal at 4-5; *Petition of Cavalier Telephone, LLC*, Case No. PUC990191, Order (June 15, 2000) at 7-9; *Petition of Focal Communications Corporation of Virginia*, Case No. PUC00079 (Jul. 19, 2000) at 1-2.

<sup>14</sup> Federal judicial review is the sole remedy under the Act to seek recourse for state commission determinations concerning interconnection agreements. See 47 U.S.C. § 252(e)(4), (6). See also *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7<sup>th</sup> Cir. 2000) (state commissions waived sovereign immunity), *cert. denied*, 69 U.S.L.W. 3297 and 69 U.S.L.W. 3346 (U.S. Jan. 22, 2001) (mem.); *AT&T Communications, Inc. v. Bell South Telecommunications, Inc.*, 2001 WL 38281 (5<sup>th</sup> Cir. 2001) (state constructively waived sovereign immunity, and *Ex parte Young* doctrine allowed suit against commissioners); *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862 (6<sup>th</sup> Cir. 2000) (state sovereign immunity barred by *Ex parte Young* doctrine), *cert. denied*, 121 S.Ct. 54 (2000) (mem.); *MCI Corp. v. Public Service Commission of Utah*, 216 F.3d 929 (10<sup>th</sup> Cir. 2000) (state constructively waived sovereign immunity, and *Ex parte Young* doctrine allowed suit against commissioners); *MCI Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7<sup>th</sup> Cir. 2000) (same).

arbitration pursuant to state law rather than the requirements of the Act, the Virginia Commission failed to carry out its responsibilities under section 252.<sup>15</sup> Moreover, Verizon does not dispute that the Virginia Commission did not carry out its section 252 responsibilities. Accordingly, based upon the same reasoning that the Commission applied in the *WorldCom Preemption Order*, we find that the Virginia Commission failed to carry out its section 252 responsibilities in this case, and we therefore preempt the jurisdiction of the Virginia Commission in the Global NAPs/Verizon interconnection arbitration proceeding in Virginia pursuant to section 252(e)(5).

7. We reject Verizon's contention that Global NAPs's petition should be dismissed for failure to provide an accompanying affidavit as required by section 51.803(a)(1) of the Commission's rules.<sup>16</sup> We waive section 51.803(a)(1) in this case upon our own motion pursuant to section 1.3 of our rules.<sup>17</sup> We find that special circumstances present in this case warrant deviation from the general rule requiring a supporting affidavit. In establishing section 51.803, the Commission held that requiring detailed petitions, supported by affidavit, will help the Commission decide whether it should assume jurisdiction based on section 252(e)(5), whereas allowing less detailed petitions to be filed will increase the investigative burdens on this Commission and increase the likelihood that parties will file frivolous petitions.<sup>18</sup> The facts here, however, are quite different from a situation where we must infer a state's failure to act from long delay or ambiguous rulings. In such a case, a detailed and properly supported petition would be essential to our judgment regarding whether to interpret a state's behavior as a failure to act. However, in this case, the Virginia Commission's failure to act is clear and unambiguous. Moreover, in this instance, Verizon did not dispute the procedural history described by Global NAPs. We also conclude that the public interest would be disserved by strict adherence to the affidavit requirement in this instance. As noted above, there is no question about the procedural history or Global NAPs's assertions. Rejecting the petition on these grounds would only cause procedural delays and possibly require Global NAPs to restart the entire negotiations process. By granting this waiver, we do not signal any general departure from Commission practice, nor do we invite other parties to file petitions that are facially inconsistent with the Commission's rules. The waiver we grant today is based on and limited to the specific facts of this case and the relief sought by the petitioner.

8. Global NAPs may now petition the Commission for arbitration of the interconnection disputes that were the subject of the Virginia Commission proceeding addressed herein, which the Chief, Wireline Competition Bureau, would conduct in accordance with the

<sup>15</sup> See *WorldCom Preemption Order* 16 FCC Rcd at 6225-27, paras. 4-5.

<sup>16</sup> See Verizon Comments at 2. See also 47 CFR § 51.803(a)(1). Section 51.803(a)(1) requires any party seeking preemption pursuant to section 252 to file "a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the state has failed to act."

<sup>17</sup> 47 CFR § 1.3. "[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>18</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16128-29 at para. 1287-88 (1996).

Commission's *Arbitrations Order*.<sup>19</sup> Therefore, to the extent Global NAPs seeks arbitration procedures inconsistent with the *Arbitrations Order*, Global NAPs's request is denied. In addition, the Chief, Wireline Competition Bureau, will issue a public notice establishing procedures and a pleading schedule specific to the upcoming Global NAPs/Verizon arbitration proceeding.

9. Finally, we reiterate the finding in the *Local Competition Order* that the Commission retains exclusive jurisdiction over any proceeding or matter over which it assumes responsibility under section 252(e)(5).<sup>20</sup> Similarly, any findings made by the Commission after it assumes responsibility over a proceeding, and any judicial review of such findings, shall be the exclusive remedies available to the parties.<sup>21</sup>

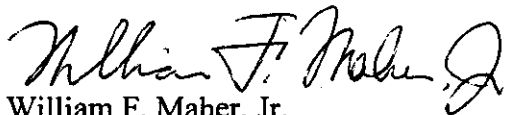
### III. CONCLUSION

10. For the foregoing reasons, we grant in part Global NAPs's petition and preempt jurisdiction of the Virginia Commission over the arbitration of unresolved interconnection agreement issues with Verizon in Virginia.

### IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and sections 0.91, 0.291 and 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. §§ 0.91, 0.291 and 51.801(b), the Petition for Commission preemption of jurisdiction filed by Global NAPs South, Inc. on June 19, 2002, IS GRANTED IN PART AND DENIED IN PART.

FEDERAL COMMUNICATIONS COMMISSION



William F. Maher, Jr.  
Chief, Wireline Competition Bureau

<sup>19</sup> *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, Order, FCC 01-21 (rel. Jan. 19, 2001) (*Arbitrations Order*). Any filings made by Global NAPs must meet the requirements of the *Arbitrations Order* and the Commission's rules governing filing of petitions for arbitration.

<sup>20</sup> *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16129, para. 1289 (1996) (*Local Competition Order*) (subsequent history omitted).

<sup>21</sup> *See* 47 U.S.C. § 252(e)(6).